

**IN THE
MISSOURI SUPREME COURT**

TREASURER OF THE STATE OF
MISSOURI,
as Custodian of the Second Injury Fund,
Appellant,

Cause No. SC92850

V.

WILLIAM DYSON
Respondent.

SUBSTITUTE BRIEF OF RESPONDENT WILLIAM DYSON

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POINT RELIED ON

I.

The Labor and Industrial Relations Commission did not err in its inclusion of Respondent's disability of pre-existing disabilities of 7.5% permanent partial disability of the right ankle in the calculation of Appellant's liability, because the Commission correctly interpreted the provisions of Section 287.220.1 to require a two-step process in which it is first determined whether a claimant qualifies to make a claim against the Second Injury Fund through means of the "thresholds", and in which it is then determined whether all disabilities were shown to be hindrance or obstacle to employment, in that such a statutory interpretation necessarily follows from a strict construction of the plain and simple language of the law.

Mo.Rev.Stat. Section 287.220.1(1993)

Mo.Rev.Stat. Section 287.800(2005)

POINT RELIED ON

II.

The Labor and Industrial Relations Commission did not err in awarding benefits to Respondent, including the 7.5% to Respondent's right ankle because there is evidence that this injury is a hindrance or obstacle to Respondent's employment or reemployment.

Respondent's Testimony

Dr. David Volarich's Testimony

ARGUMENT

I.

The Labor and Industrial Relations Commission did not err in its inclusion of Respondent's disability of pre-existing disabilities of 7.5% permanent partial disability of the right ankle in the calculation of Appellant's liability, because the Commission correctly interpreted the provisions of Section 287.220.1 to require a two-step process in which it is first determined whether a claimant qualifies to make a claim against the Second Injury Fund through means of the "thresholds", and in which it is then determined whether all disabilities were shown to be hindrance or obstacle to employment, in that such a statutory interpretation necessarily follows from a strict construction of the plain and simple language of the law.

The Labor and Industrial Relations Commission did not err in its inclusion of Respondent's pre-existing disabilities of 7.5% permanent partial disability of the right ankle in the calculation of Appellant's liability. The Commission correctly interpreted Section 287. 220.1 to require a two-step process in which the first determination is whether a claimant qualifies to make a claim against the Second Injury Fund through means of the "thresholds", and the second determination is whether all disabilities were shown to be a hindrance or obstacle to employment. As required by statute, this is a strict construction of the plain and simple language of the law.

A. The Labor and Industrial Relations Commission's Analysis

The Commission bases its analysis on Section 287.800 and Section 287.220.1.

Section 287.800.1 states:

"Administrative Law Judges, associate administrative law judges, legal advisors, the Labor and Industrial Relations Commission, the Division of Workers' Compensation and any reviewing courts shall construe the provisions of this chapter strictly." *Section 287.800.1.*

Section 287.220.1 states:

"After the compensation liability of the employer for the last injury, considered alone, has been determined by an Administrative Law Judge or the Commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that Administrative Law Judge or by the Commission and the degree or percentage of disability which existed prior to the last injury, plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the Second Injury Fund...." *Section 287.220.1.*

Under the plain language of the statute, once it is determined that the thresholds are met, all disabilities that existed at the time of the work injury should be considered in the calculation of the Second Injury Fund liability.

ARGUMENT

II.

The Labor and Industrial Relations Commission did not err in awarding benefits to Respondent, including the 7.5% to Respondent's right ankle because there is evidence that this injury is a hindrance or obstacle to Respondent's employment or reemployment.

A. Respondent's Testimony

Respondent testified at trial that he sustained injury to his right foot in 2001. T.9. He received medical treatment in the form of steroid injections and physical therapy to his right foot. T.9. Even after receiving that medical treatment, Respondent continues to have problems and symptoms in his right foot. T.9. He continues to experience pain in the right anterior ankle especially when standing for long periods of time. T.139. He continues to experience pain in the right ankle when performing any deep squatting. T. 139. He also notices an increase in discomfort with changing barometric pressure. T.139. Respondent testified that the combination of injury to his right foot and his neck causes problems both on and off the job. T.10. Respondent testified that because of the combination of these two injuries he finds it harder to lift objects and figures out different ways to try to compromise for the injuries. He tries to place more weight on the left side. T.10. He has greater difficulties getting up and down from tow motors. T. 10.

Respondent testified that because of the combination of both injuries, his work activities are more difficult. T.11.

B. Dr. David Volarich's Testimony

Dr. Volarich testified Respondent has a 20% permanent partial disability of the right lower extremity rated at the ankle due to the strain injury and tendonitis that required injections. T.145. The rating accounts for ongoing pain, particularly with prolonged weightbearing and prolonged squatting activities. T. 145. Dr. Volarich concludes that Respondent's permanent industrial disability to his right foot existed and is a hindrance to his employment or reemployment. T.145.

Therefore, based upon the credible evidence presented by the Respondent and Dr. Volarich, the Commission did not err in awarding benefits to Respondent, including 7.5% permanent partial disability to Respondent's right ankle, because there is evidence that this injury is a hindrance or obstacle to employment or reemployment.

CONCLUSION

The Labor and Industrial Relations Commission properly concluded this case by strictly construing Section 287.220.1 which requires the inclusion of all disability in the Second Injury Fund calculations, once Fund liability has been established. Additionally, there is credible evidence that Second Injury Fund benefits, including the 7.5% permanent partial disability to the right foot, should be awarded to Respondent. As such, the decision of the Commission should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby states that on this 2nd day of November, 2012, a true and correct copy of the foregoing was filed electronically via Missouri CaseNet and that a copy of this brief has been provided to opposing counsel, Da-Niel Cunningham, at the Assistant Attorney General, via electronic filing.

The undersigned further certifies that this brief complies with the page limitations prescribed by the Missouri Rules and local rules of this court in that it contains 1,260 words.

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